INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	9
Conclusion	12

CITATIONS

CASES:

United States v. *Toronto Nav. Co.*, 338 U. S. 396 ..... 10, 11
Westchester County Park Commission v. *United States*, 143 F. 2d 688, certiorari denied, 323 U. S. 726 11

MISCELLANEOUS:

New York Laws of 1945, ch. 3, as amended, McKinneys Unconsolidated Laws, sec. 8521, et seq. 3

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 629

TISHMAN REALTY & CONSTRUCTION COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court on trial (R. 488-519) and on motion for new trial or rehearing (R. 636-645) are reported at 92 F. Supp. 384. The *per curiam* opinion of the court of appeals (R. 657) is reported at 193 F. 2d 180.

JURISDICTION

The judgment of the court of appeals was entered January 2, 1952 (R. 658). The petition for

a writ of certiorari was filed March 4, 1952. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether the district court committed error of law in rejecting the capitalization method of valuation and determining the value of the property condemned in the light of sales of other property and other considerations, when the court was of the opinion that the income predictions by petitioner's witnesses were unreliable and unbelievable.

STATEMENT

On July 1, 1947, the United States instituted this action to condemn the fee title to premises known as 252 Seventh Avenue in the Borough of Manhattan, for use by the Veterans Administration (R. 1, 5-8). The land taken was approximately 49,000 square feet in area and was improved by a building, partly sixteen stories and partly eleven stories in height, units of which had been built for heavy manufacturing purposes at various times from 1904 to 1916 (R. 6-7, 21-22, 490-491). It was owned and occupied by a mail-order house until 1932, at which time the owner encountered financial difficulties and title was taken by Metropolitan Life Insurance Company, the mortgagee, in lieu of foreclosure (R. 22, 492). From 1932 to 1942 the property was vacant and suffered a high degree of deterioration (R. 22, 60, 95, 492).

During 1941 and 1942, the building was completely renovated for office use at a cost of more than $1,300,000.00 in preparation for use by the Government, which in February of 1942 executed a lease for a term of one year, subject to renewal for additional yearly periods, at an annual rental of $320,000.00 (R. 23, 38-39, 41-46, 96, 393-400, 404, 491-492). In August of 1945, petitioner purchased the property from Metropolitan for $2,800,000.00, a price which was approximately equal to the cost of the property to Metropolitan, but more than $500,000.00 in excess of the book value or estimated market value (R. 23-24, 248, 403-404). The property was active in the market and quick action was necessary to obtain it at Metropolitan's asking price, which the principal officer of petitioner acknowledged to be more than his opinion of fair market value (R. 137, 154, 246, 248). At the time, there was in effect in New York an emergency rent law by which the rentals of commercial and business properties, such as here involved, were controlled, but under which rentals could be automatically increased 15% above the rent in effect on the "freeze" date, or could be further increased by arbitration or court proceedings (R. 492, 505-506). See New York Laws of 1945, ch. 3, as amended, McKinneys Unconsolidated Laws, sec. 8521, *et seq.* Such was the situation in 1947 when the United States determined to acquire fee title to the premises.

> tion, which is a misnomer—there was never any arbitration in practice—they of course paid the high rents.
>
> If you would want an appraisal based on income you would not know what rents to take. You have $1 rents and 50 cent rents on the same block. There is always the possible means of averaging the two, but it really indicates nothing.

He acknowledged that in 1947 petitioner could have obtained rentals of $1.25 per square foot (R. 235) but pointed out that such rentals could only be obtained under the arbitration procedure and could not be considered the long term rent necessary to afford a basis for capitalization (R. 243-244, 298-300). The arbitration procedure was subject to much criticism because in practice, rather than having any real arbitration as to a reasonable rent, the landlord would not let a tenant into possession before agreeing to a specific rental, and the arbitrator was selected with the understanding that he would fix the rental at the agreed figure (R. 209, 211-212, 244).

Basing his opinion principally on sales which he considered comparable (R. 214, 252, 388-389), the government witness estimated the fair market value of the property taken to be $3,000,000.00, of which $550,000.00 was allocated to the land (R. 230, 487). Although being of the view that the capital-

ization method of appraisal was not then as reliable as it had previously been, he did, however, make use of the method in checking his estimate of value (R. 230, 236, 257, 387). He took as the basis for the maximum long range income an annual rental of $368,000.00, which was the same as the emergency rent, i.e., 15% more than the rent being paid by the Government, and arrived at a value substantially the same as his estimate based on sales (R. 230, 236, 486).

To rebut this opinion as to the reliability of the capitalization method in 1947, petitioner called as witnesses four officials of lending institutions (R. 335-360), who testified that in 1947 their institutions gave primary consideration to the capitalization method in appraisals (R. 336-337, 354, 356, 360). However, they were not in any serious disagreement with the government witness who had testified that even in 1947 he would use the capitalization method in the event of an outstanding long term lease with a reliable tenant (R. 252-253, 257). They stated that they would rely upon capitalization only when there was a "stabilized" income (R. 336, 356-359, 360), and in the event of any great discrepancy with value established by comparable sales, they would conclude that something was wrong with the estimated net income (R. 339-340, 355) and would give great consideration to the sales (R. 345). These witnesses testified only as to use of the capitalization method in

general and were not asked to value the property taken.

At the conclusion of the trial, the court viewed not only the condemned property and the immediate area, but also the properties referred to as comparable (R. 489, 496, 568), and found that just compensation should be in the amount of $3,090,000.00 ($640,000.00 for the land and $2,450,000.00 for the building), the award for the building being exactly the same as the valuation placed on it by the government witness (R. 487, 518). In an exhaustive opinion (R. 488-519), the court explained its reasoning leading to the award and expressed agreement with the bases and reasoning of the government witness at every material point where there was a difference of opinion, especially as to the poor potentialities of the area (R. 496-499), the demand for small units, rather than units as large as 49,000 square feet (R. 498, 508), the unfairness of the arbitration procedure of fixing rentals (R. 505-506), and the impossibility of making accurate long range estimates of rental income (R. 506-507). In view of these factors the court found "no reason to suppose that normal economic pressure will operate to force rental values to the levels suggested by the claimant" (R. 508) and concluded that "regardless of its merits in other cases, the capitalization method is simply too hazardous and too uncertain" in this particular case (R. 507, 514). Consequently, in

determining the amount of just compensation the court rejected petitioner's appraisals based upon the capitalization method (R. 513, 514). It based its award, not on any one abstraction or method of valuation, but on a consideration of "the physical characteristics of the property, the peculiarities of the area in which it is located, the teachings of the history of property in that area and adjacent areas, my own inspection of the building and of comparable properties, sales which were brought forward on the theory that they involved equivalent buildings, and every bit of information that seemed relevant" (R. 513, 644).

Petitioner filed a motion for new trial or rehearing (R. 536-546), offering new evidentiary matter. This motion was denied, the court explaining in a lengthy opinion (R. 636-645) that none of the new matter would have caused any change in the conclusions as to value (R. 644-645). On January 2, 1952, the court of appeals affirmed the judgment on the basis of the opinions of the district court (R. 657-658).

ARGUMENT

1. It may be conceded that the four sales relied upon by the district court in determining the amount of just compensation do not establish a market "price" for the condemned property. "But that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant's

property. We simply must be wary that we give these sparse sales less weight than we accord 'market' price, and take into consideration those special circumstances in other sales which would not have affected our hypothetical buyer." *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402. The record in this case makes it plain that the district court did not give any undue weight to the sales in the determination of value. They were merely considered along with the other evidence which the court deemed to be relevant (R. 509-514, 643-644). Obviously, there was no error in this respect.

2. Petitioner contends (Pet. 13, 17-24) that the district court erred in refusing to adopt the capitalization method of determining value. Plainly, this contention lacks merit. In the abstract, the capitalization of net income may be an acceptable means of determining the value of income producing property. But this can only be so when the evidence establishes adequate bases for the use of the process. This is not such a case. The district court found, and the record amply supports the findings, not only that the emergency rent law had made it nearly impossible to make accurate long range estimates of income (R. 506), but also that, even without the impact of the emergency rent law, it was impossible to believe that the property here involved could be rented at the prices suggested by petitioner's witnesses (R. 508-509,

514).[2] It being impossible to make any finding as to fair rental value on the evidence before it, the district court was amply justified in rejecting the capitalization method of valuation, and would have been in error otherwise. *Westchester County Park Commission* v. *United States,* 143 F. 2d 688, 693 (C.A. 2), certiorari denied, 323 U.S. 726; cf. *United States* v. *Toronto Nav. Co.,* 338 U.S. 396, 406.

3. The district court carefully weighed all the evidence introduced at the trial and, after such consideration, eliminated that which it deemed of no probative value and based its award on the evidence which it deemed relevant. Plainly, the court of appeals properly affirmed such award. The case presents no conflict and no important question which has not been adequately resolved by this Court. In the last analysis, the petition merely seeks a reweighing of the evidence and a different determination as to relative probative values. This presents nothing for this Court to review.

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[2] Pointing out that "many closely adjacent properties . . . remain blighted" the court said: "It is not reasonable to suppose that this shy behaviour of capital would occur if it were possible for Tishman to purchase a building in 1945 for $2,800,000 and to demonstrate that in 1947 its sound value for investment purposes is $5,030,000." (R. 507).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1952.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—996146/P.O. 997